incorrect on both counts. In holding that an attorney has a duty of good-faith inquiry "when he is put on notice that his fee may derive from a pool of frozen assets," Pet. App. 11a, the court of appeals relied on a leading treatise on the law governing attorneys' ethical obligations, see *id.* at 11a-12a (quoting 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 9.32, at 9-136 (3d ed. Supp. 2005)), the "well established doctrine" that an attorney is "an officer of the court," *id.* at 12a, decisions from other courts, *id.* at 12a-14a, and asset forfeiture provisions in the federal criminal code, *id.* at 15a. Petitioners do not explain why the court's reliance on any of those sources is misplaced, and they do not identify any decision or rule that conflicts with the court's holding.[3]

First, the decision below does not establish "completely different standards" (Pet. 24) than those set forth in the Sixth Circuit's decision in *In re Bell & Beckwith*, 838 F.2d 844 (1988), on which the court of appeals here relied. See Pet. App. 13a-14a. In that case, a bankruptcy trustee sought to recover fees that an attorney had been paid by an insolvent debtor who was also the target of a fraud investigation. The court held

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duty to conduct a good-faith inquiry—one that goes beyond merely taking the client at his word.

[3] Petitioners' contention (Pet. 10-11) that the TRO was void for vagueness lacks merit. The TRO was not vague. It applied to, *inter alia*, those "persons or entities in active concert or participation with" the defendants. Pet. App. 4a. The record showed that Alliance and Valdine were entities that clearly fit that description. *Id.* at 5a-6a, 11a; see pp. 3-4, *supra*. Petitioners' vagueness claim thus reduces to their contention that they had no duty to investigate the source of their fee. The court of appeals correctly held that the circumstances presented to petitioners triggered such a duty, Pet. App. 15a-17a, and that fact-bound conclusion does not merit further review.

that, under Ohio law, "if the totality of the circumstances surrounding the conveyance of the assets given to [attorney] Connelly aroused suspicion, Connelly should have inquired as to the source of the property he received." 838 F.2d at 849. The court reviewed the circumstances and held that Connelly was under a "duty of inquiry as to the source of his fee." *Ibid.* Thus, *Beckwith* is entirely consistent with the decision below. See Pet. App. 15a (holding that suspicious circumstances imposed on petitioners a "duty to make a good faith inquiry" as to the source of their fees).

Second, the court of appeals' decision is not "at odds with" (Pet. 3) another case on which it relied, *CFTC* v. *Co Petro Mktg. Group, Inc.*, 700 F.2d 1279 (9th Cir. 1983). See Pet. App. 12a-14a. In *Co Petro*, the Ninth Circuit held that a law firm had to return the proceeds of a $60,000 check that it received from its client, whose assets had been frozen by the district court in an action charging it with violations of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.* Because the law firm was aware that a receiver had been appointed and that a decision adverse to its client had been entered by the district court, the Ninth Circuit concluded that the law firm violated the permanent injunction by depositing the check without "inquir[ing] as to the exact terms of the district court's decision." 700 F.2d at 1285. Consistent with *Co Petro*, the court of appeals here held that petitioners had a duty to inquire about the source of their fee, given that the asset freeze applied not only to the named defendants but also to those "persons or entities in active concert or participation with" them. Pet. App. 4a, 15a.

Finally, petitioners' contention that the decision below conflicts with prior decisions of the same court in *FSLIC* v. *Dixon*, 835 F.2d 554 (5th Cir. 1987) (Pet. 25),

and *United States* v. *Thier*, 801 F.2d 1463 (5th Cir.), modified on reh'g, 809 F.2d 249 (5th Cir. 1986) (Pet. 26-28), does not justify review by this Court. This Court does not sit to resolve alleged intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no conflict. In both cases, the defendants argued that the district court should release frozen funds to pay attorney's fees. As the court in *Thier* explained, whether such a release should be allowed, and the amount of funds that should be released, depends on the specific facts of each case. 801 F.2d at 1474. Neither *Dixon* nor *Thier* involved an attorney's attempt to keep funds paid out in violation of an asset freeze.

In sum, petitioners have failed to identify any conflict among the circuits created by the decision below.[4] Their claim that they had no duty to investigate the source of their fee thus merits no further review.

2. Petitioners contend (Pet. 14-19) that the Sixth Amendment entitles them to keep the money they received in violation of the asset freeze. That claim is meritless. It is well settled that, as the court of appeals held (Pet. App. 17a), the Sixth Amendment right to

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[4] *In re Dolen*, 265 B.R. 471 (Bankr. M.D. Fla. 2001), cannot create a circuit conflict because it is not, as petitioners mistakenly contend, a decision of the Eleventh Circuit. See Pet. 4, 25-26. In any event, *In re Dolen* is irrelevant. It merely holds that, if the FTC obtains an asset freeze, and if the target of that freeze invokes the protection of the Bankruptcy Code, the automatic stay provision of the Code precludes the FTC from enforcing the freeze against assets that were obtained by the debtor subsequent to the bankruptcy petition and that were unrelated to the conduct challenged by the FTC. 265 B.R. at 485. Unlike *In re Dolen*, there was no bankruptcy at issue here and no indication in the record that the funds paid to petitioners were obtained after entry of the asset freeze.

counsel does not apply to civil cases. See *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 25 (1981).[5] Petitioners nevertheless contend that the Sixth Amendment applies because they were retained not only for the FTC's civil action, but also for "pending criminal investigations." Pet. 16. Even assuming a criminal investigation had been commenced by some agency other than the FTC (which has only civil enforcement authority, see 15 U.S.C. 57b), the Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991) (internal quotation marks omitted); see *Fellers* v. *United States*, 540 U.S. 519, 523 (2004). Because petitioners do not even allege that such proceedings occurred here, their Sixth Amendment claim lacks merit and does not warrant further review.[6]

3. Petitioners also ask this Court (Pet. 9-14, 19-22) to review the inquiries they did conduct upon receiving the fees, and to find that those inquiries were sufficient

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[5] Indeed, every case cited by petitioners in support of their argument involved a criminal, not a civil, defendant (or counsel for a criminal defendant). See *Wheat* v. *United States*, 486 U.S. 153 (1988) (Pet. 15); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (Pet. 15); *Gandy* v. *Alabama*, 569 F.2d 1318 (5th Cir. 1978) (Pet. 15); *Thier*, *supra* (Pet. 15); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989) (Pet. 17); *United States* v. *Monsanto*, 491 U.S. 600 (1989) (Pet. 17).

[6] Moreover, even if petitioners' clients had been subject to formal criminal proceedings, this Court made clear in *Caplin & Drysdale* that the Sixth Amendment only "guarantees defendants in criminal cases the right to adequate representation," 491 U.S. at 624, not "representation by an attorney that [they] cannot afford," *ibid.* (quoting *Wheat*, 486 U.S. at 159).

under the circumstances. As the court of appeals recognized, the nature of the appropriate inquiry that an attorney must conduct depends on the particular fact situation. Pet. App. 15a-17a. The court here carefully examined the record and found that, whereas petitioner Draskovich should have been aware from the outset that "something was awry," *id.* at 15a, and thus "needed to do far more than simply take his client at his word that the fees were not tainted," *id.* at 16a, petitioner Kajioka may not have received such inquiry notice until three days after he was paid, *id.* at 16a-17a. Accordingly, the court held that Draskovich had to return his entire fee, but Kajioka could keep $10,000 of the amount he received. That fact-bound conclusion does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ROBERT M. DRASKOVICH and DEAN Y. KAJIOKA

Petitioners,

v.

ROBB EVANS & ASSOCIATES, L.L.C. and FEDERAL TRADE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE TEXAS ASSOCIATION OF DEFENSE COUNSEL AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE

The Texas Association of Defense Counsel ("TADC")[1] is the largest state association of civil trial, personal injury defense and commercial litigation attorneys in the United States, whose practice is concentrated on the defense of civil tort lawsuits. The TADC is devoted to the just and efficient administration of civil justice. To that end, it advocates a system of tort reparations in which (1) plaintiffs are fairly compensated for genuine injuries; (2) non-responsible defendants are exonerated without unreasonable cost; and (3) responsible defendants are held liable only for appropriate damages.

The TADC's interest in this matter arises from the fact that its members are primarily defense counsel who, due to the nature of their representation, will be most affected by the Fifth Circuit's underlying opinion. Because the TADC believes that such opinion creates an unreasonable and (practically speaking) unworkable standard that conflicts with more realistic standards of other circuits, it requests that the Court resolve the conflict and, in so doing, create a more balanced analysis that considers the interests of all involved. Further, if the opinion remains in force, the TADC believes that a defendant's ability to exonerate himself may be financially crippled from the very beginning, and will require defense counsel to question his client's honesty on little more than his accuser's allegations.

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1. This brief has been authored in its entirety by undersigned counsel for the amicus curiae. No person or entity, other than the named amicus and its counsel, made any monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and their letters of consent are being lodged herewith.

SUMMARY OF ARGUMENT

The Fifth Circuit has determined that when a lawyer is asked to represent a client accused of fraud and had all his assets frozen in an *ex parte* proceeding (so that a third party must necessarily agree to pay his fees), then that attorney is on notice that any fee payments may be funded by an improper source; consequently, says the Fifth Circuit, the lawyer has a duty to "audit" relevant books and records before accepting the fee and beginning representation. Otherwise, and apparently despite the emergency nature of the client's circumstances, the defense lawyer accepts such legal representation at his peril.

The TADC respectfully suggests three problems with this opinion that require resolution. First, that the Fifth Circuit sets too slight a trigger for the duty to inquire (whether that duty is to audit or otherwise), and that such conflicts with the decisions of the Third and Sixth Circuits in *In re Bressman (Wasserman v. Bressman)*, 327 F.3d 229 (3d Cir. 2003), and *In re Bell & Beckwith (McGraw v. Connelly)*, 838 F.2d 844 (6th Cir. 1988), respectively. Second, even if the trigger should be as slight as the lower court suggests, the duty to "audit" a client's books and records before beginning representation is unreasonable, especially in light of the emergency circumstances then confronting the client, and is in conflict with other circuits. And third, before concluding that a defense lawyer must disgorge his fee, a district court should be required to consider the circumstances at issue at the time the fee is paid (rather than after a judgment is entered or agreed), so as to balance the need to protect assets garnered by an alleged wrongdoer against the danger of placing the financial reins of a defendant's defense entirely in the hands of the plaintiff/prosecution. Otherwise, every counsel who agrees to accept representation will do so at his own risk, and necessarily ties compensation to success on the merits. This, perforce, creates an atmosphere antagonistic to compromises, plea agreements, and the swift and expedient administration of justice.

ARGUMENT

Mindful of Rule 37.2, the TADC first states simply that it agrees with the arguments made by Petitioners in their *Petition for Writ of Certiorari.* In addition, the TADC offers the following bases for granting the requested writ:

I. The Fifth Circuit's Opinion Is Unreasonable in this Instance Because It Sets Too Low a Standard for Triggering a Duty of Inquiry into the Source of Defense Fees, so that In Virtually Every Circumstance in which an *Ex Parte* Asset Freeze Is Ordered or a Constructive Trust Is Alleged, a Duty of Inquiry Is Mandated; as such, the Standard Imposed Conflicts with Decisions from the Third and Sixth Circuits that Have Applied Reasonable Standards.

Two circuit opinions have directly addressed in what circumstances a defense attorney has a duty to inquire as to the source of his fees. Those are *In re Bressman (Wasserman v. Bressman)*, 327 F.3d 229 (3d Cir. 2003), and *In re Bell & Beckwith (McGraw v. Connelly)*, 838 F.2d 844 (6th Cir. 1988). As noted below, the Third and Sixth Circuits utilized a reasonable, workable standard in those opinions that conflicts with that followed by the Fifth Circuit.

A. In re Bell & Beckwith and In re Bressman.

1. In re Bell & Beckwith.

In *Bell & Beckwith*, a bankruptcy trustee sought the return of $150,000 worth of items advanced by the debtor brokerage firm's managing partner to his criminal defense attorney. 838 F.2d 844 (6th Cir. 1988) The court found that the managing partner had "bilked" the brokerage firm out of $47,000,000 over a span of years to fund his personal investment in various ventures, including a Las Vegas hotel and casino. *Id.* at 845. His fraud unraveled over a span of a

few days. On February 5, 1983, the brokerage firm was placed in receivership by the Securities and Exchange Commission ("SEC"). 846 Immediately thereafter, the United States Attorney's Office initiated an investigation. *Id.* at 846-47. On that same day, the managing partner confessed his fraud to his personal attorney, Frank McManus. *Id.* at 846. Recognizing the need for a more experienced criminal defense attorney, McManus began attempting to contact William M. Connelly and engage him on behalf of the client. *Id.* However, McManus's initial efforts to contact Connelly were unsuccessful. *Id.*

On February 6, 1983, the managing partner and his wife assigned all their assets to the brokerage firm to offset the debts incurred by the fraud and, hopefully, avoid the closure of the brokerage firm. *Id.* The next day, McManus finally reached Connelly, who agreed to represent the client. *Id.*

On February 9, 1983, Connelly learned from reading the local newspaper that his client and client's wife had assigned their assets to the brokerage firm. *Id.* at 847. On that day, he sent a letter repudiating the assignment to the firm. *Id.* The following day, he accompanied his client to an interview conducted at the United States Attorney's Office by the Federal Bureau of Investigation. *Id.* During that interview, and with Connelly present, Connelly's client represented that his fraud involved at least $36,000,000, that stock in Toto, Ltd. ("Toto") was used to effectuate the fraud, that a margin account in the name of TZ Land and Cattle ("TZ") was used to effectuate the fraud, and that the client had been covering losses to his investment in the Landmark Hotel (and casino) in Las Vegas. *Id.* He further stated that the trading and bank accounts were held in his wife's name. *Id.*

The following day, Connelly received a briefcase containing, among other things, jewelry embossed with the

insignia of the Landmark Hotel, $100,000 in Treasury notes, and shares of Toto and TZ. *Id.* This stock and jewelry represented payment for Connelly's legal services.

After the brokerage firm was placed in bankruptcy, the trustee claimed the bankruptcy estate held an interest in the funds paid to Connelly. *Id.* at 848. Following a bench trial on that issue, the presiding magistrate found that Connelly was a good faith purchaser for value, and that he had no "inquiry" notice of the of the estate's interest in the property. *Id.* In reaching his decision, the magistrate applied an "insolvency" standard, opining that if Connelly reasonably believed that his client could satisfy the harm caused by his fraud and still remain solvent, then Connelly took in good faith. Finding Connelly reasonably held such a belief, the magistrate held in Connelly's favor. *Id.*

Holding the magistrate's fact findings clearly erroneous, the Sixth Circuit reversed. *Id.* at 849. Applying Ohio law of constructive trusts, the Sixth Circuit accepted the trustee's proposed "nature-of-the-property" standard.[2] *Id.* Simply stated, Sixth Circuit concluded that the very nature of the property Connelly received should cause a reasonable person to inquire into its origin. *Id.* In particular, the court noted that two days after learning his client's assets were assigned to the brokerage firm and one day after his client admitted utilizing Toto, TZ and the Landmark Hotel to effectuate his fraud, the client sent Connelly a briefcase filled with Toto and TZ stock, and jewelry embossed with the Landmark Hotel insignia. *Id.* Thus, because the nature of the property would have aroused the suspicion of a reasonable person, Connelly was deemed to have knowledge that any inquiry excited by

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2. The Trustee appealed the trial court's decision under Ohio common law governing bona fide purchasers, and bankruptcy statute 11 U.S.C. § 548 (West 1987). Finding that Ohio common law required reversal, the Sixth Circuit never addressed the issue under § 548.

that suspicion would have yielded. *Id.*, citing RESTATEMENT OF RESTITUTION § 174, *Lewis v. Akerberg*, 100 Ohio App. 209, 218, 136 N.E.2d 372, 379 (1954), and OHIO JUR.3D, "Notice," § 18 (1987). Moreover, because the very nature of the property and the facts Connelly necessarily knew showed the property he received was involved in his client's fraud, the Sixth Circuit remanded with instructions to the district court to enter judgment for the bankruptcy trustee. *Id.* at 850.

2. *In re Bressman.*

In *Bressman*, a law firm, Cole, Shotz, Meisel, Forman & Leonard, P.A. ("Cole Shotz") had been hired to represent a Chapter 11 debtor who declared bankruptcy in July 1996. 327 F.3d 229, 233 (3d Cir. 2003). At the time that representation began, Cole Shotz informed the debtor/client that its fees had to be paid from non-estate assets. *Id.* Thereafter, Cole Shotz received payments from various sources, including accounts held by the debtor's wife. *Id.*

Also in the summer of 1996, the SEC began a fraud investigation against the debtor. *Id.* After the investigation began, the debtor's wife hired the firm Newman & Schwartz ("Newman") to represent her. *Id.* At the time their representation began, Newman was assured that the wife had independent means, separate from the debtor, to pay Newman's fees. *Id.*

After approximately one year, the bankruptcy was changed from a Chapter 11 to a Chapter 7 bankruptcy, and a trustee was appointed. *Id.* Following his appointment, and before several fee payments were made, the trustee informed Cole Shotz and Newman that he was investigating the source of their payments, as he believed they had come from estate assets. *Id.* at 234.

Following the trustee's investigation, it came to light that a trust account established in the Cook Islands had transferred funds to the wife's account shortly before each check was written to pay fees. *Id.* Moreover, that trust account held assets of the bankruptcy estate. *Id.* The trustee demanded that the firms return their fees and then filed a summary judgment, claiming that, at a minimum, the firms were on "inquiry" notice at the time the trustee informed them that it was investigating the source of their fee payments. *Id.* The firms responded and filed cross-motions, claiming that they had been assured that their fees came from non-estate sources, and that a duty to inquire had not been triggered before the payments were received. *Id.* The bankruptcy court granted judgment for the firms, finding them to be good faith transferees for value. *Id.* at 235. The district court affirmed that decision. *Id.*

The Third Circuit affirmed the district court's decision. The court first noted that bankruptcy statute 11 U.S.C. § 550(b)(1) governed the matter. *Id.* at 235-36. Section 550(b)(1) states that "a trustee may not recover . . . from (1) a transferee that takes for value . . . , in good faith, and without knowledge of the voidability of the transfer avoided."[3] Relying of other circuit courts interpreting this statute to conclude that "a transferee has knowledge if he knew facts that would lead a reasonable person to believe the property transferred was recoverable," the Third Circuit applied a "duty of inquiry" analysis. *Id.* at 236, citing *In re Sherman*, 67 F.3d 1348, 1357 (8th Cir. 1995). In particular,

3. Unlike *Bell & Beckwith*, the Third Circuit never addressed the common law of New Jersey or New York, where it appears the act occurred, regarding bona fide purchasers. Indeed, it does not appear from the opinion that appellant addressed the issue. However, it does appear that the issues were nevertheless the same under a § 550(b)(1) analysis; that is, whether defense counsel gave value, and whether defense counsel was on notice of that the funds paid to him belonged to (and were recoverable by) the bankruptcy estate.

the court stated that "the issue is whether the facts known to the firms and the reasonable inference to be drawn from those facts would affirmatively suggest to a reasonable person in their position that they were receiving assets of the estate. If not, there would be no duty to investigate." *Id.* at 237.

Following this analysis, the court noted that the affidavit testimony established that the debtor's wife had assured Newman that she could independently pay attorneys' fees, and that Cole Shotz had altered its fee arrangement following the institution of Chapter 7 proceedings. *Id.* at 237-38. The court further noted that the firms had each devoted a substantial amount of time representing the debtor and his wife, actions the court noted a sophisticated firm would not have taken had it been aware of a fee payment issue. *Id.* at 238.

The court also held that the trustee's argument that he put the firms on notice by informing them of his own investigation, was probative of nothing. *Id.* at 238-39. Rather the court noted that the trustee had a duty to pursue assets of the estate, and the fact he was investigating the source of the fee payments was not probative of whether the firms had reason to believe their fees were paid with estate assets. *Id.* at 239. Consequently, knowledge of the trustee's investigation did not put the firms on notice that they should do the same.

B. The Fifth Circuit's Decision Conflicts with Bell & Beckwith and Bressman as to When a Duty of Inquiry Is Triggered.

The Fifth Circuit's decision conflicts with the Third and Sixth Circuit concerning when a duty of inquiry is triggered. As the facts of each case shows, a wide discrepancy now exists as to when a lawyer has a duty to inquire into the source of his legal fees.